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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 861

JAMES NASSER PRODUCTIONS, INC., RESSAN INCORPORATED, JAMES NASSER, STRAND PRODUCTIONS, INC., CHARLES WEINTRAUB and QUALITY FILMS, INC.,
Petitioners,

vs.

HONORABLE THURMOND CLARKE, DISTRICT JUDGE,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petitioners,

vs.

HONORABLE THURMOND CLARKE, DISTRICT JUDGE,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of *certiorari* issue to review the order of the United States Court of Appeals for the Ninth Circuit, entered on December 28, 1956, denying petitioners' petition for the issuance of a writ of mandamus and/or prohibition to direct the respondent District Judge to revoke certain orders made and entered by him in the within consolidated cause.

Opinions Below.

The Order sought to be reviewed was entered in an original proceeding for mandamus and/or prohibition filed in the Court of Appeals. The Order, made without Opinion, is unreported, and appears in Appendix A, *infra,* page 1a. A petition for rehearing and for hearing *en banc* was denied, without Opinion, and is unreported. The Order denying rehearing appears in Appendix B, *infra,* page 2a. The Orders of the District Court were made without Opinion and are unreported.

Jurisdiction.

The Order of the Circuit Court of Appeals denying mandamus and/or prohibition was entered on December 28, 1956, Appendix A, *infra*, page 1a. The Order denying rehearing was entered on January 31, 1957, Appendix B, *infra*, page 2a. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1) and 28 U. S. C. 1651(a).

Questions Presented.

The following questions are presented:

(1) Whether the "All Writs Act" (28 U. S. C. 1651(a)) confers power upon the Court of Appeals to review by a prerogative writ a District Court's interlocutory order refusing to make an express determination under Rule 54(b) of the Federal Rules of Civil Procedure that there is no reason for delay to enter judgment on dismissal of multiple counterclaims and whether proper to compel the entry of order from which an appeal might be taken.

(2) Whether Rule 54(b), providing that the court may direct entry of final judgment upon one or more but less than all the claims in an action, is applicable to multiple parties as well as to multiple claims, and what are the guiding principles in making a determination under the Rule.

(3) Whether the All Writs Act confers power upon the Court of Appeals to issue a mandate to compel the reinstatement of stricken defenses, denials of averments and counterclaims from pleadings, to prevent a failure of justice.

(4) Whether the issuance of a writ under the All Writs Act is proper to revoke an order entered by a District Court denying all discovery proceedings under the Federal Rules of Civil Procedure to a litigant. (Rules 26 and 34.)

(5) Whether the parties to an action are entitled to depositions and discovery proceedings as a matter of *right* or as a matter of *discretion* under the Federal Rules

of Civil Procedure and what are the guiding principles in the enforcement of the discovery rules. (Rules 26-37.)

(6) Whether the All Writs Act confers power upon the Court of Appeals to issue a mandate to restrain the compelled production of confidential records to a business competitor on irrelevant and privileged matter beyond the scope of the action under the discovery rules.

(7) Whether in an infringement suit, the accounts may be probed by discovery production before the right to an accounting has been adjudged.

(8) Whether the issuance of a writ under the All Writs Act is proper to review interlocutory orders made by a District Judge arbitrarily and with partiality between litigants.

(9) Whether the All Writs Act confers jurisdiction upon the Courts of Appeals to review by writ of mandamus and/or prohibition a District Court's interlocutory orders upon any of the grounds of (1) abuse of discretion, (2) excess of the court's power, (3) refusal by the court to perform its duty under the Rules of Civil Procedure, (4) persistent violation of the Rules of Civil Procedure, or (4) for other good cause in the interests of justice and to prevent injustice, and what are the guiding principles.

Statutes and Rules Involved.

The statutory provisions and rules involved are: The "All Writs Act," 28 U. S. C. A. Sec. 1651(a); Section 1254(1) of "Judiciary and Judicial Procedure," 28 U. S. C. A. Sec. 1254(1); Rule 54(b) of the Federal Rules of Civil Procedure, as amended, 28 U. S. C. A. Rule 54(b); Rules 26 and 34 of the Federal Rules of Civil Procedure, as amended, 28 U. S. C. A. Rule 26, Rule 34. They are printed in Appendix C, *infra*, pp. 3-5.

The pertinent provision of the "All Writs Act" (28 U. S. C. A. 1651(a)) reads as follows:

> "(a) The Supreme Court and all courts established by Act of Congress may issue all writs neces-

sary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Statement.

The Orders made and entered by the respondent District Judge, sought to be vacated by the original petition for writ of mandamus and/or prohibition, are printed in the Exhibits to the petition, and a summary of the orders appears in the Supplemental Petition (*pp. 4-10*), submitted to the Circuit Court, which are filed herewith. The Court of Appeals denied summarily the petition, without issuance of an Order to Show Cause, and without Opinion. The considerations moving the respondent District Judge to make the orders are, therefore, unknown, and the grounds of denial by the Circuit Court are unkown. At no time has the District Judge rendered any decisions or stated any grounds for the rulings. On several occasions, however, the respondent Judge stated from the bench that he was ruling "arbitrarily".* [*Ex. E, Supp. Pet.*] The petitioners claim that, irrespective of such admission of arbitrariness, the orders in question, all in favor of plaintiff and all adverse to defendants, plainly show that the respondent Judge acted arbitrarily, with uniform partiality to plaintiff and uniform unfairness to defendants, without regard to the merits, with gross abuse of discretion, in excess of the court's powers, with persistent disregard of the Federal Rules of Civil Procedure, in deprivation of defendants' rights, and resulting in a grave failure of justice.

The moving parties are multiple defendants in two companion cases, consolidated, pending before the respondent

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*Plaintiff's Counsel, recognizing the significance of the Judge's admission of arbitrary action, suggested to the Court: "Well, your Honor always uses the word 'arbitrarily', but I think you are not acting arbitrarily at all. I think what you mean is without further argument." Whereupon the Court stated: "Without further argument. All right." [Rep. Tr. D. Ct. Nov. 5, 1956.]

District Judge to whom the case has been assigned for all purposes. (*United Artists Corporation v. James Nasser Productions, Ressan Incorporated, James Nasser, Strand Productions, Inc., Charles Weintraub and Quality Films, Inc., Numbers 17529-TC, 17530-TC, S. D. Calif. C. D.*) The jurisdiction of the District Court was invoked by the plaintiff because of alleged infringement of copyrights on certain motion picture photoplays, also, on diversity of citizenship, under 28 U. S. C. Sec. 1332, the amount in controversy being in excess of $3,000.

The respondent District Judge ordered stricken, from the Third Amended Answer [*Ex. C, p. 12*], without leave to amend, not only counterclaims and affirmative defenses but also certain denials of averments [*Exs. P, T, pp. 119, 129*], and refused to issue a certificate for appeal under *Rule 54(b)* on such dismissal of multiple counterclaims [*Ex. V, p. 134*]. The motion for dismissal was made under *Rules 8(a)(b)(e), 10(b) and 12(f).* [*Ex. O, p. 113.*] A motion to join additional parties defendants on certain of the counterclaims was also denied. The arbitrary nature of the strikings appears from their inconsistencies, such as, identical paragraphs stricken from one of the Answers and not stricken from the other Answer of the same defendants in the two consolidated actions; and certain defenses stricken from the Answer of one group of defendants and identical defenses not stricken from the Answer of the other group of defendants; and certain paragraphs of the Answer not previously stricken subsequently stricken; and certain defenses and counterclaims previously stricken in part thereafter completely stricken; all without reason or explanation; and notwithstanding that the almost identical pleading has been held good and sufficient by other courts in other cases involving other motion pictures of other producers against this same plaintiff. The inconsistencies of the strikings are summarized in (*Supp. Pet. pp. 10*) and are designated on the pleading. [*Ex. C, p. 12.*] The Judge also, without cause

or reason, refused to allow defendants any discovery proceedings of plaintiff, while on the other hand, granted to plaintiff, who is a business competitor, unlimited depositions of defendants and unlimited production of defendants' records even beyond the scope of the rules on irrelevant and privileged matter wholly unrelated to the action, extending beyond the periods of alleged infringement, and even penalized the defendants and their attorney for making objection to such unauthorized production. On the other hand, the Judge refused to compel the defendants to comply with defendants' proper Notices of Deposition, stipulation, order, and *subpoena duces tecum*, for production of plaintiff's records, notwithstanding plaintiff's wilful default, and granted immunity to plaintiff against any discovery proceedings by defendants. On other motions made by the respective parties, the Judge granted relief as requested by plaintiff, including the improper grant of *ex parte* applications to plaintiff and refusal of Stays to defendants even pending determination of motions, thereby rendering academic certain of defendants' motions, while, on the other hand, granting *ex parte* continuances to plaintiff to the extent of rendering pending proceedings moot for defendants. Said defendants filed notices of appeal from the aforesaid orders to the Circuit Court of Appeals, which, however, were not perfected nor docketed, in view of the court's refusal to issue a certificate under *Rule 54(b)* thereby precluding finality. Defendants, thereupon, instead of proceeding on appeal, moved under the All Writs Act for mandamus and/or prohibition, in view of the admittedly interlocutory nature of the orders.

In essence, the complaint in this action alleges that the Ressan and Strand defendants, copyright owners, had licensed to the plaintiff, by written agreement, the right to distribute the motion picture photoplays theatrically and on television, and that, upon plaintiff's failure and refusal to make television distribution, the said defendants allegedly conspired with the other defendants for television

distribution by such other defendants. The contract between the defendants for the televising of the pictures was made pursuant to a court order made by a Referee in Bankruptcy in other Court proceedings and confirmed by a United States District Court. The plaintiff had appealed therefrom in that other case but had not stayed the enforcement of the court order pending that appeal. Upon the Circuit Court's determination of that appeal the license period under the agreements had expired on three of the pictures and was about to expire on the fourth picture, so that plaintiff had no further interest in the pictures thereafter. The Court on that appeal construed one of the clauses of the agreement to the effect that plaintiff was not compelled to make television distribution under that provision. Performance under the other provisions of the agreement was not there involved, nor was the theatrical distribution an issue in that case. The plaintiff thereafter brought this lawsuit against the defendants for having televised the pictures, alleging conspiracy to infringe on plaintiff's license rights and for an accounting of the television proceeds. The defendants filed their answers to said action, including affirmative defenses of laches and estoppel and reliance on the aforesaid court order authorizing such televising which had not been stayed. The defendants Ressan and Strand, owners of the pictures and of the copyrights, claimed, as additional affirmative defenses, termination of the distribution agreements, and as separate counterclaims, claimed against the plaintiff for improper distribution of the pictures during the period of the license term, seeking an accounting, damages and a setoff on the basis of facts arising under the same agreement and on the same pictures on which the complaint was based and arising out of the same transaction, also on an additional picture arising in part out of the same series of transactions involving common questions of fact and law, and moved to join on certain of the counterclaims additional necessary parties defendants.

The counterclaims, separately stated, allege causes of action for (1) Breach of Agreement (2) Cancellation of Agreement (3) Monies Had and Received (4) Conversion (5) Inducing Breach of Contract and Conspiracy to Interfere with Property Rights (6) Breach of Fiduciary Trust (7) Fraud (8) Negligence (9) Accounting (10) Illegal Conspiracy and Restraint of Trade (11) Injunction. The 10th counterclaim alleges damages of $4,000,000, and the other counterclaims allege a total of $3,025,000 as actual damages and $3,025,000 as punitive damages. The counterclaims were all stricken except the second which, however, incorporates the stricken first counterclaim. The stricken denials and stricken defenses would constitute a complete defense to the action. The counterclaims were not theretofore involved in any other lawsuits between the parties. This case was set for trial, on the court's own motion, for October 1, 1957.

The pleadings and exhibits of motions and orders were separately annexed to the petition for mandamus and/or prohibition and are filed herewith.

REASONS FOR THE WRIT.

A.

GENERAL REASONS.

It is respectfully submitted that a review on writ of certiorari is warranted by the special and important reasons of this case.

The issues raised by this petition are the concern not merely of the immediate litigants. They are of public importance.

Its reviewability can be justified by substantially all of the grounds, or any one of the independent grounds, separately stated in the Rules of the Supreme Court.

1. This case, involving multiple issues and multiple conflicts, is particularly appropriate for the grant of certiorari, to determine in one certiorari proceeding, multiple problems, of great importance, concerning enforcement

of federal rights and applying to all litigation in the federal courts, necessary to proper judicial administration in the federal system, and to make uniform the interpretation and enforcement of federal laws by the District and Circuit Courts.

2. The court below, in denying relief under the All Writs Act, reached a determination in conflict, not only with other Circuits, but also within the Circuit and decided federal questions in a way in conflict with applicable decisions of this court.

3. The diversity of opinion expressed by the Courts interpreting and applying the All Writs Act calls for the exercise by this Court of its supervisory powers to settle the conflicts that have arisen and which have multiplied.

4. The All Writs statute is a remedial act. Denial of relief to the petitioners, who are without any other remedy, would be contrary to its spirit. Appeal after final judgment would come too late for adequate relief.

5. Petitioners are entitled to issuance of writ, to correct an injustice, and to prevent a failure of justice.

6. This Court recently granted certiorari in another case (B-1-B, *infra*), involving mandamus proceedings, on the stated ground of the "importance of the questions in the administration of the Federal Rules of Civil Procedure, together with the uncertainty existing on the issues among the Courts of Appeals." Continued uncertainty remains as to many other discretionary rules of the Federal Rules of Civil Procedure not settled by this Court, requiring like action for review.

7. Grant of this petition will afford the Court an opportunity to dispel the conflict of views among the circuits and to clarify the practice.

8. Settlement of the question by this Court is plainly in the public interest, since it is likely to be presented in almost every proceeding involving interlocutory orders which have multiplied since the adoption and amendment of the Federal Rules of Civil Procedure.

9. Grant of this petition will also afford the Court the opportunity to dispel multiple conflicts among the circuits in the interpretation and application of a substantial number of important rules of the Federal Rules of Civil Procedure, including the Discovery Rules.

10. One of the rules involved in this petition is Rule 54(b) of the Federal Rules of Civil Procedure. This Court recently granted certiorari in two other cases (11-B, *infra*), under Rule 54(b) on the subject of multiple *claims,* on the stated ground of "a conflict of judicial decisions on the subject," but the kindred question of its applicability to multiple *parties* was not presented nor decided therein and remains unresolved. Several Circuit Courts, including the court below, have called for a ruling by this Court on the subject of multiple *parties* as well as on multiple *claims.*

11. Since the conflict has developed over the proper interpretation to be given to a Rule promulgated by the Supreme Court, it is peculiarly within the province of this Court to elucidate what it intended the effect of the Rule to be and to indicate a standard for determination in the application of Rule 54(b) by the federal courts.

12. The respondent District Judge, in failing to view this case, from the start of proceedings, with the impartiality between litigants that the defendants were entitled to receive, and in varying in the standards applied between litigants, whether unconsciously or otherwise, and in admitting "arbitrary" action, and in virtually nullifying the Federal Rules of Civil Procedure, and in depriving the petitioners of substantive, substantial, constitutional rights, has so far departed from the accepted and usual course of judicial proceedings, and the Circuit Court, in denying relief, has so far sanctioned such a departure by the lower court, as to call for an exercise of this court's power of supervision, necessary to the proper administration of justice in the federal system.

B.
SPECIFIC REASONS FOR GRANTING THE WRIT.

I.

The Extreme Diversity of Views Expressed by the Courts of Appeals Construing the All Writs Act, Coupled With the Far Reaching Consequences of the Holding of the Court of Appeals in the Case at Bar, Call for Review by This Court to Define and Delineate the Extent of Power and Authority Granted to the Courts of Appeals by the All Writs Act.

A. The Conflict Among and Within the Circuits Interpreting and Applying the All Writs Act.

In denying relief under the All Writs Act, the court below reached a determination in conflict not only with *other* Circuits but also *within* the Circuit, to-wit:

The Ninth Circuit, though denying a writ to the petitioners herein, found authority in the All Writs Act to review orders in: *Connelly v. United States,* 191 F. 2d 692, 693 (1951), wherein the writ was held "particularly applicable" in a case where "the remedy by appeal is inadequate"; *Gladstein v. McLaughlin,* 230 F. 2d 762 (1955) similarly; *Whittel v. Roche,* 88 F. 2d 366, 381 (1937), wherein a writ issued to compel the lower court to dismiss a suit to enable the complainant to proceed in another action by jury trial "where the right of appeal may be entirely ineffective to correct the erroneous ruling of the trial court"; and *Warner Bros. Pictures, Inc. v. United States District Court, S. D. of California,* 79 F. 2d 1021 (1935), wherein it was directed that the order of the District Court requiring impounding of film be vacated as "in excess of jurisdiction." This Circuit also reviewed an order transferring a case within the Circuit but from one district to another, in *Shapiro v. Bonanza Hotel Co.,* 185 F. 2d 777 (1950). Such holding was in direct conflict with the refusal of the Eighth Circuit to

entertain a writ to review a transfer within the Circuit, in *Carr v. Donohoe,* 201 F. 2d 426 (1953).

The *Seventh* Circuit, interprets the All Writs Act as giving it the widest latitude in reviewing otherwise unappealable interlocutory orders entered by a District Judge. It has adhered to the view that the All Writs Act confers power upon it to act whenever it is shown that a Trial Court has abused its discretion or arrived at what the Court believes to be an erroneous decision. See *e.g., Chicago R. I. & P. R. Co. v. Igoe,* 212 F. 2d 378 (1955), where that Court, in directing a District Judge to vacate an unauthorized interlocutory order, "relied on a series of decisions by the courts of other Circuits." The Seventh Circuit declared its policy "to construe broadly the Court's jurisdiction rather than narrow it," in *Re Babcock,* 26 F. 2d 153, 155 (1928).

The *First* Circuit has refused to construe the "All Writs Act" as empowering it to supervise interlocutory orders of District Courts in advance of final decision. But it has construed the All Writs Act as affording it authority to review a transfer order transferring a cause to another Circuit, but not with authority to review a refusal to transfer. See *e.g., In re Josephson,* 218 F. 2d 174 (1954). It has by the same reasoning refused to intervene by mandamus where the Trial Judge refused to transfer a case to the non-jury calendar (*In re Chappell & Co.,* 201 F. 2d 343) (1953); where the Trial Court refused to grant a motion for a jury trial (*In re Previn,* 204 F. 2d 417) (1953); or where the lower Court had permitted the substitution of a party plaintiff (*In re Sylvania Electric Products,* 220 F. 2d 423) (1955).

The *Eighth* Circuit has adhered to the construction of the All Writs Act followed by the First Circuit. See *e.g., Carr v. Donohoe,* 201 F. 2d 426 (1953) (refusal to review order transferring case to another district within the same Circuit); *Hydraulic Press Manufacturing Co. v. Moore,* 185 F. 2d 800 (1950) (refusal to review order denying motion to quash return of service).

Decisions by other Circuits do not follow the consistent pattern pursued by the First and Eighth Circuits.

The *Third* Circuit, in *Canister Co. v. Leahy,* 191 F. 2d 255 (1951), issued mandamus directing the Trial Court to grant a jury trial, in direct conflict with the position of the First Circuit (*In re Previn,* 204 F. 2d 417) (1953) and Eighth Circuit in *Petsel v. Riley,* 192 F. 2d 954 (1951), and denied a petition for relief in the attempted review of a Trial Court's refusal to dismiss a complaint (*American Airlines v. Forman,* 204 F. 2d 230) (1953) and also where a Trial Court order to produce documents was challenged (*Pennsylvania R.R. Co. v. Kirkpatrick,* 203 F. 2d 149) (1953). In the latter two cases the Third Circuit used language and reasoning closely paralleling the reasons advanced by the First and Eighth Circuits in support of their construction of the All Writs Act.

The *Second* Circuit first refused, then entertained, writs of mandamus in transfer cases. *Magnetic Engineering Co. v. Dings Mfg. Co.,* 178 F. 2d 866 (1950); *Ford Motor Co. v. Ryan,* 82 F. 2d 329 (1950); *Tores v. Walsh,* 221 F. 2d 319 (1955).

The *Fifth* Circuit, in *Ex parte Pfizer & Co.,* 225 F. 2d 720 (1955), noted the diversity of opinion as to the proper application of the All Writs Act, and adopted a middle of the road approach.

The conflict in principle between the determination of the Ninth Circuit in the instant case and the decisions of the other Circuits is compellingly clear.

As aptly stated in *Moore's Federal Practice* (2d ed. 1953) (pp. 109, 281-282, 290):

> "There is a good deal of obscurity about its proper function . . . It is often impossible to determine with any degree of certainty from the mass of confused and conflicting decisions under this statute, whether a particular interlocutory order can be reviewed by one of the prerogative writs . . . The

scope of the Statute is uncertain and the practice under it needs clarification . . . what type of order and under what circumstances a petition for review will in general be deemed proper . . . It needs a new birth."

B. The Summary Denial of the Court of Appeals to Review by Writ of Mandamus and/or Prohibition the District Court's Interlocutory Orders, is in Direct Conflict With the Principles of a Recent Decision of This Court.

The court below, in so denying summarily relief under the All Writs Act, reached a determination in conflict with the principles of the recent Opinion of the Supreme Court of the United States in the case of *LaBuy v. Howes Leather Company, Inc.* (352 U. S. 249, 77 S. Ct. 309, 1 L. Ed. 2d 290), decided on January 14th, 1957.

That decision held that "the Court of Appeals properly issued the writs of mandamus," revoking orders of reference entered by the lower court.

While the decision was confined to the facts of that case in finding those circumstances an "abuse of power," Mr. Justice Clark, speaking for the Court, used language, at page 256, peculiarly applicable to the case at bar, that: "They amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation."

The Opinion also restated general principles of earlier decisions of this Court, particularly appropriate to the instant case, that:

> "Where the subject concerns the enforcement of the . . . rules which by law it is the duty of this Court to formulate and put in force, mandamus should issue to prevent such action thereunder as is so palpably improper as to place it beyond the scope of the rule invoked . . . Were the court to find that *the rules have been practically nullified by a district judge it would not hesitate to restrain him.*" (Emphasis added.)

It will be noted that the grounds in the case at bar are much more inclusive than those set out in that case, and involve persistent, flagrant violations of the Federal Rules of Civil Procedure and practically a nullification of a number of the rules.

C. The Court Below Has Decided a Federal Question Which Conflicts in Principle With Applicable Decisions of This Court.

The denial of a writ by the court below clearly frustrates the legislative policy under the All Writs Act, and conflicts in principle with prior decisions of this Court.

Other cases in which this Court has issued an extraordinary writ do not show circumstances any more "extraordinary" than those at bar. Indeed, the case at bar is *a fortiori.*

In *McCullough v. Cosgrove* (1940), "persistent disregard of the Rules of Civil Procedure" was held special circumstances justifying issuance of the writ *(309 U. S. 634, 60 S. Ct. 703, 84 L. ed. 992).* See also:

United States v. U. S. District Court for the S. D. of N. Y. (1948) (334 U. S. 258, 68 S. Ct. 1035, 92 L. ed. 1351);

Los Angeles Brush Manufacturing Corp v. James (1927) *(272 U. S. 701, 47 S. Ct. 286, 71 L. ed. 481);*

Ex parte United States (1932) *(287 U. S. 241, 53 S. Ct. 129, 77 L. ed. 283);*

United States Alkali Assn. v. United States (1945) *(325 U. S. 196, 65 S. Ct. 1120, 89 L. ed. 1554);*

Ex parte Kawato (1942) *(317 U. S. 69, 63 S. Ct. 115, 87 L. ed. 58);*

Maryland v. Soper (1926) *(270 U. S. 9, 28, 46 S. Ct. 185, 70 L. ed. 449);*

Ex parte Simons (1918) *(247 U. S. 231, 38 S. Ct. 497, 62 L. ed. 1094);*

Berger v. United States (1921) *(255 U. S. 22, 36, 41 S. Ct. 230, 65 L. ed. 481);*

Ex parte Bradley (1869) *(74 U. S. 364, 376, 7 Wall. 364, 19 L. ed. 214);*

DeBeers Consolidated Mines v. United States (1945) *(325 U. S. 212, 65 S. Ct. 1130, 89 L. ed. 1566);*

Ex parte Peru (1942) *(318 U. S. 578, 582, 63 S. Ct. 793, 87 L. ed. 104);*

McClellan v. Carland (1910) *(217 U. S. 268, 279, 30 S. Ct. 501, 54 L. ed. 762).*

The denial of the court below thus conflicts in principle with prior and controlling decisions of this Court.

It is respectfully submitted that the Court of Appeals has erroneously decided questions of critical importance to the federal courts, amply meriting review by this Court in the exercise of its supervisory powers over the federal courts.

D. The Importance of the Question Involved Under the All Writs Act.

The best evidence of the importance of the jurisdictional issue raised in this case under the All Writs Act is the serious conflict which has developed among and within the courts of appeals.

A resolution of the issues here is of paramount importance in determining appellate jurisdiction to review orders of the District Court.

II.

The Court of Appeals, in Refusing a Writ to Compel the Entry of Final Judgment Under Rule 54(b) of the Federal Rules of Civil Procedure, Decided an Important Question of Federal Law Which Should Be Reviewed by This Court.

A. Conflict in Applying the All Writs Act to Rule 54(b).

The court below denied summarily petitioner's application for a writ to compel, among other things, the entry of an Order in the lower court from which an appeal might be taken under *Rule 54(b)* of the *Federal Rules*

of Civil Procedure, both as to multiple claims and as to multiple parties, thereby defeating appellate review.

In so doing, the Ninth Circuit reached a determination contrary to the principles of an earlier case within the Circuit [*Whittel v. Roche,* 88 F. 2d 366, 377 (1937)].

B. The Denial of a Certificate Under Rule 54(b) Is in Direct Conflict With the Applicable Decisions of This Court.

The denial of a Certificate under Rule 54(b) to make final and appealable the District Court's order dismissing the counterclaims, and the refusal of the Court of Appeals to review the District Court's abuse of discretion, conflict with two recent cases decided by this Court, on June 11th, 1956, to-wit: *Sears Roebuck & Co. v. Mackey (351 U. S. 427, 76 S. Ct. 895, 100 L. ed. 780),* and *Cold Metal Process Co. v. United Engraving & Foundry Co. (351 U. S. 445, 76 S. Ct. 904, 100 L. ed. 789).*

In the *Sears* case, which involved multiple claims, it was held, that the District Court may, "in the interest of sound judicial administration, release for appeal final decisions upon one or more, but less than all, claims in multiple claims actions" and that "any abuse of that discretion remains *reviewable by the Court of Appeals.*"

This Court reached a similar result in the *Cold Metal* case, which involved counterclaims, and held that counterclaims, whether "compulsory" or "permissive," are treated like other multiple claims under *Rule 54(b),* "while retaining a *right of judicial review over the discretion exercised by the District Court* in determining when there is no just reason for delay."

It is obvious that a writ is the only method of such judicial review, in view of the interlocutory nature of the order, and that unless reviewed at this stage of the proceedings it could never be reviewed at all, since review would come too late on appeal after final judgment.

C. The Diversity of Views as to the Applicability of Rule 54(b) to Multiple Parties as Well as to Multiple Claims. The Court Below Decided a Question of Federal Law Which Has Not Been, but Which Should Be, Settled by This Court.

The denial of a Certificate under Rule 54(b) to make final and appealable the order denying joinder of additional defendants on certain of the counterclaims, conflicts with the rulings of other circuits which make Rule 54(b) applicable to multiple *parties* as well as to multiple *claims*.

This Court, in deciding the application of *Rule 54(b)* to multiple *claims*, in the *Sears Roebuck*[1] and *Cold Metal*[2] cases, *supra*, did not pass upon the subject of multiple *parties*.

The Ninth Circuit Court of Appeals gave full expression to such conflict on the issue of multiple *parties* and invited a ruling by this Court, as follows:[3]

> "*Several circuits* have held or appear to have held that Rule 54(b) is applicable to multiple *parties* as well as to *claims* . . . The Rule nowhere mentions *parties* . . . *Parties* are not *claims* . . . An amendment to make the Rule applicable to multiple *parties*, as well as to *claims*, may be *desirable to prevent injustices* . . . But rule making is not our business."

The order of the court below in the instant case is in direct conflict with the decision of the Second Circuit on multiple parties as well as multiple claims, in another case,[4] involving the same plaintiff as is involved in the case at

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[1] *351 U. S. 427, 76 S. Ct. 895, 100 L. ed. 780 (1956).*

[2] *351 U. S. 445, 76 S. Ct. 904, 100 L. ed. 789 (1956).*

[3] *Steiner v. 20th Century-Fox Film Corporation, 220 F. 2d 105 (9th Cir. 1955).*

[4] *United Artists Corp. v. Masterpiece Productions, Inc., 221 F. 2d 213 (C. A. 2, 1955).*

bar, and with other decisions of the Second Circuit.[5] It is also in conflict with the decisions of the First,[6] Third,[7] and District of Columbia Circuit Courts of Appeals,[8] wherein determinations were made under Rule 54(b) involving multiple parties as well as multiple claims.

In the Second Circuit,[10] Judge Learned Hand, reached the conclusion, on multiple claims under Rule 54(b), that: "In the end, the Supreme Court will no doubt have to pass upon it."

This Court granted certiorari in the *Sears* and *Cold Metal* cases, *supra*, "because of a conflict of judicial decisions on the subject" of multiple *claims*. Like action should be taken on the kindred question of multiple *parties*.

As pointed out in *Moore's Federal Practice* (2d ed., 1953), (p. 245):

> "How stands the matter under amended 54(b)? This Rule . . . deals with the problem of finality from the point of view of multiple *claims;* and we accordingly believe that part of the troublesome problem between 'jointness' and 'distinctness' remains with us as to multiple *parties.*"

D. The Reviewability of Rule 54(b) Orders Requires Greater Clarification. The Diversity of Views Interpreting and Applying Rule 54(b) to Multiple Claims, and the Absence of Uniform Standards.

One of the purposes of amended Rule 54(b) was to eliminate uncertainty, and to provide "a simple, definite, workable rule" for finality.

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[5]*Colonial Airlines, Inc. v. Janas, 220 F. 2d 914 (C. A. 2, 1953); Lopinsky v. Hertz Drive-Ur Self Systems, 194 F. 2d 422 (C. A. 2, 1951); Pabellon v. Grace Line, 191 F. 2d 169 (C. A. 2, 1951) (Writ of cer. den.).*

[6]*Boston Medical Supply Co. v. Lea & Febiger, 195 F. 2d 853 (C. A. 1, 1952).*

[7]*Bendix Aviation Corp. v. Glass, 195 F. 2d 267 (C. A. 3, 1952).*

[8]*Williams v. Protestant Episcopal Theological Seminary in Va., 91 U. S. App. D. C. 69, 198 F. 2d 595, cert. den. 344 U. S. 864; Vale v. Bonnett, 191 F. 2d 334 (1951) (D. of Col. Ct. of Ap.).*

[10]*Flegenheimer v. General Mills, 191 F. 2d 237, 241 (C. A. 2, 1951).*

The need for clarification and for a standard was pointed out in the Opinion of Mr. Justice Frankfurter, whom Mr. Justice Harlan joined, concurring in the *Sears* case and dissenting in the *Cold Metal* case, as follows:

> "The Court does not, however, indicate what standards the district courts and the courts of appeals are now to apply in determining when a decision is final. (P. 439.)
>
> "Its enforcement is committed without guidance to the individualized notions about finality of some two hundred and fifty district judges, themselves accountable to the discordant views of eleven essentially independent courts of appeals. Allowing such leeway to the district courts and courts of appeals is not flexibility but anarchy." (P. 443.)

The question, thus, remains unresolved.

As aptly expressed in *Moore's Federal Practice* (2nd ed. 1953) (p. 212):

> "If the final judgment rule is uncertain of application it will breed appeals by litigants uncertain of their rights but properly zealous of protecting them; . . . with a resulting expense to the litigants, and loss of both time and energy to the litigants and to the courts."

E. The "Discordant Views" of the Courts in the Application of Rule 54(b) Is Typified by the Denial in the Case at Bar Which Is in Conflict With Another Circuit in a Case Involving the Same Party.

The instant case affords an excellent illustration of such "discordant views" of the district courts and the courts of appeals, despite the purpose designed by the *Sears* and *Cold Metal* cases to resolve the conflict.

Notwithstanding this Court's decision in those two cases, the respondent District Judge refused to issue a certificate under Rule 54(b), while, in another Circuit, a

District Judge in another case,[11] involving the same party plaintiff, but involving other defendants, granted therein a certificate under Rule 54(b), upon similar dismissal of counterclaims, arising under some of the same facts and circumstances, and reversed the dismissal.

Mr. Justice Burton, writing for the majority of this Court in the *Cold metal* case,[12] stated: "This is the very kind of case for which amended Rule 54(b) was designed." The case at bar is *a fortiori*.

To paraphrase: This is the very kind of case for which the grant of *certiorari* was designed.

III.

The Lower Court, in Exercising Discretionary Power Arbitrarily and With Persistent Partiality Between Litigants, so Far Departed From the Accepted and Usual Course of Judicial Proceedings, and the Court Below, in Denying Relief, Has so Far Sanctioned Such Departure, as to Call for an Exercise of This Court's Power of Supervision.

A. Arbitrary Exercise of Discretionary Power Is an Abuse of Discretion, Properly Rectified by a Writ.

The refusal of the court below to review by prerogative writ the arbitrary and partial, unfair acts of the respondent District Judge, was inconsistent with decisions within the Circuit that "Discretion is abused when the judicial action is arbitrary, fanciful or unreasonable."[13]

The language of the Sixth Circuit[14] is peculiarly applicable to this case:

> "Whether unconsciously or otherwise, he failed from the start . . . to view this case with the *impartiality between litigants* that the *defendants were entitled to receive.*" (Emphasis added.)

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[11] *United Artists Corp. v. Masterpiece Productions, Inc., 221 F. 2d 213 (C. A. 2, 1955).*

[12] *351 U. S. 445, 451, 76 S. Ct. 904, 100 L. ed. 789 (1956).*

[13] *Delno v. Market St. Ry. Co., 124 Fed. 965, 967 (C. A. 9, 1942).*

[14] *Knapp v. Kinsey, 232 F. 2d 458, 465 (C. A. 6, 1956).*

In the *Second* Circuit, the learned Circuit Judge Learned Hand aptly pointed out,[15] that "the very substance of the issue of partiality" is that *"even justice"* had not been dealt out, and held that the conduct in all the proceedings "must be scrutinized to ascertain whether they had *varied in the standards applied*" and that the case must go back for hearing upon the issue of partiality.

In the instant case, the respondent Judge's *own admission* of *"arbitrary"* acts constitutes a *presumption*, requiring the grant of certiorari.

This Court, in an Opinion written by Mr. Justice Black,[16] emphasized, that "fair trials" are the "most cherished policies of our civilization."

As Mr. Justice Frankfurter pointed out:[17]

> "The administration of justice by an *impartial* judiciary has been basic to our conception of freedom ever since Magna Carta. *It is the concern not merely of the immediate litigants. Its assurance is everyone's concern.*" (Emphasis added.)

It is as true today, as almost a century ago, when the Supreme Court held:[18]

> *"Without, therefore, the issue of the writ of mandamus, however flagrant the wrong committed against these officers they would be destitute of any redress."* (Emphasis added.)

B. A Writ Under the Exceptional Circumstances of This Case Is Not Contrary to Policy and Is Proper to Correct an Injustice and to Prevent a Failure of Justice.

A writ, under such exceptional circumstances, and in avoidance of "piecemeal *trials*," would not be contrary to

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[15]*Hyman v. Pottberg, 101 F. 2d 262, 266 (C. A. 2, 1939).*

[16]*Bridges v. California (1941), 314 U. S. 252, 260, 62 S. Ct. 190, 86 L. ed. 192.*

[17]*Id. p. 282.*

[18]*Ex parte Bradley (1869), 74 U. S. 364, 7 Wall. 364, 19 L. ed. 214, 376.*

policies against "piecemeal *appeals,*" or encourage mandamus proceedings.

As stated in *Moore's Federal Practice*:[19] It is an "obsolete notion" that the writ proceeding "is always against the Trial Judge. In form it is. In substance it is usually no more a suit against the Trial Judge than an appeal."

In any event, as Mr. Justice Frankfurter pointed out:[20]

> "Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions . . . they may forget their common human frailties and fallibilities . . . Therefore Judges must be kept mindful of their limitations and of their ultimate public responsibility . . ."

As aptly expressed in Moore's Federal Practice:[21]

> "The use of the discretionary writ of mandamus to review so-called 'interlocutory orders' could direct attention to the *real question:* Is *this* the sort of interlocutory order that the appellate court, *in the interest of justice,* should review *now*? . . . *Mandamus* may yet provide the most sensible and convenient solution to the continuing conflict between the policy of limiting appeals and that *demanding justice* in the individual case." (Emphasis added.)

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[19]2d ed. 1953, pp. 281-2.

[20]*Bridges v. California (1941), 314 U. S. 252, 290, 62 S. Ct. 190, 86 L. ed. 192.*

[21]*2d ed. 1953, p. 109.*

IV.

A Writ of Mandate Is Proper to Compel District Judge to Conform to the Federal Rules of Civil Procedure, Persistently Disregarded. In Refusing a Writ, the Court Below Decided Important Questions of Law Concerning Enforcement of Federal Rights and Applying to All Litigation in the Federal Courts, Which Should Be Reviewed by This Court.

A. Abuse of Discretion Under the Rules of Pleading, Depriving a Litigant of the Constitutional Right of Trial, Is Properly Reviewable.

The Respondent Judge had, by a previous ruling, invited a motion for *"summary judgment,"* then ordered stricken, without just cause or reason, the counterclaims, denials and defenses, without leave to amend, and refused to issue a certificate for appeal under *Rule 54(b)*. The dismissal was made under *Rules 8(a)(b)(e), 10(b)* and *12(f)*, not under *Rule 56*.

The lower court cannot use the technique of striking a pleading without leave to amend, to grant collaterally an Order admittedly having the effect of Summary Judgment, on genuine issues of fact, thereby depriving a litigant not only of a trial on the merits but also of finality for appeal. The court below should not have allowed the District Judge to exploit the dismissal device in this fashion.

Such denial is in conflict with the practice in the United States Courts which favors determinations of cases on their merits, rather than upon the sufficiency of pleadings, and does violence to the established policy that the Rules of Civil Procedure should be construed liberally.

It is a dangerous precedent for the federal courts, unless corrected by this Court.

B. The Lower Court Cannot, Under the Guise of Discretion, Strike From Pleadings That Which the Rules Make Mandatory.

The District Court acted beyond the scope of discretionary power in striking that which the Rules make *mandatory*, to-wit, *compulsory* counterclaims,[22] denials[23] and affirmative defenses,[24] and *compulsory* joinder of necessary parties,[25] and in striking *arbitrarily* even if permissive,[26] under the Federal Rules of Civil Procedure.[27]

The arbitrary nature of the orders made by the Respondent Judge is clearly shown by the record.[28]

The differing interpretations among the lower courts under the Rules of Pleading is vividly illustrated by the instant case. The pleading stricken by the Respondent Judge is almost identical with other pleadings held proper and sufficient by other Courts in other cases involving the same respondent party,[29] on similar facts and circumstances, and even prepared by the same counsel for petitioners herein.

The conflict is further illustrated by another case involving the *same* respondent plaintiff in another Circuit,[30] where the *Second* Circuit Court of Appeals *reversed* the dismissal of other defendants' similar counterclaims and authorized joinder of the additional defendants. In an-

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[22]*Rule 13(a):* "A pleading *shall* state as a counterclaim . . ."

[23]*Rule 8(b)(d)(e), Rule 9(b)(c):* "A party *shall* . . . admit or deny . . ."

[24]*Rule 8(c):* "A party *shall* set forth affirmatively . . . and any other matter constituting an *avoidance or affirmative defense*".

[25]Rule 13(h): ". . . the court *shall* order them to be brought in as defendants".

[26]*Rule 13(b)(c), Permissive Counterclaims; Rule 18, Joinder of Claims; Rule 20, Permissive Joinder of Parties.*

[27]*Rule 8(f):* "*All* pleadings *shall* be so construed as to do *substantial justice*".

[28]*(Exhibit C, p. 12 of Pleadings Exhibits). (Supp. Pet. p. 10).*

[29]*Plaintiff, United Artists Corporation, also as defendant.*

[30]*United Artists Corporation v Masterpiece Productions, Inc., 221 F. 2d 213, 217 (C. A. 2, 1955).*

other case[31] involving the *same* respondent plaintiff (defendant therein), where similar claims were ordered *not* stricken, the District Court's decision was quoted with approval and followed by other Courts in other Circuits.[32]

It is clear that petitioners in the instant case, by such strikings, are deprived of their substantive right to assert at the trial their meritorious defenses, denial of averments, and compulsory counterclaims; and that the court's error must necessarily result in reversal upon an appeal. Such remedy after final judgment is neither speedy nor adequate. The parties are entitled to have all of the issues tried at one time. The courts abhor a multiplicity of suits.

The obvious intent of this Court, in formulating the Rules on counterclaims, was to provide for the disposition, *in a single action,* of all conflicting claims between parties arising out of the same transaction.

The grant of certiorari, to make uniform the reviewabiliity of such interlocutory orders on pleadings, is within this Court's supervisory powers over the lower courts to conform with the Federal Rules of Civil Procedure.

C. In Refusing a Writ, the Court in Effect Nullified the Discovery Rules Which Should Be Reviewed by This Court.

The petitioners are entitled, *as of right,* to discovery proceedings, under the Federal Rules of Civil Procedure. *(Rules 26 to 37.)*

The Respondent Judge, without cause or reason, refused *any* discovery to *defendants,* even after plaintiff's wilful default, while granting *unlimited* discovery proceedings to *plaintiff* even beyond the scope of the rules. Such blanket denial to petitioners is contrary to the letter and spirit of the discovery rules and abrogates their express purpose, which should properly be rectified by a writ,

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[31] *Samuel Goldwyn, Inc. v. United Artists Corporation, 35 Fed. Supp. 633, 636 (1940).*

[32] *Federal Deposit Ins. Corp. v. Alter, 14 F. R. D. 67 (D. Ct. Pa., 1953).*

under the declared policy of broad and liberal discovery in the federal courts.

This is the very kind of case for which the discovery rules were designed. Here, the case not only is unusually complicated, and the bulk of the evidence will consist of voluminous records, but most of the data is peculiarly within the information and in the possession and under the control of the adverse party plaintiff. Further, the plaintiff's testimony is required by defendants not only for discovery purposes in preparation for trial but also for evidentiary use at the trial, otherwise unavailable.

Refusal by the court below to review the District Court's orders in violation of the discovery Rules, is in conflict with decisions in other circuits.

In the *Second* Circuit, the District Court held:[33] "To categorically deny the plaintiff the *right of discovery* would be an *abuse of discretion.*"

Such nullifying interpretation of the discovery rules, is a deprivation of *rights,* not an exercise of *discretion.* It is a *failure to exercise* the court's power to order discovery. Appellate review after final judgment, obviously, would come too late.

D. Importance of the Questions for Review Relating to Discovery Proceedings.

Even a casual glance at the decisions under the discovery rules, will reveal that many district courts, immune from review because of the usually interlocutory nature of decisions on discovery rules, have in many instances set up difficult barriers apart from those created by the orders below.

As pointed out by the Third Circuit Court of Appeals:[34]

> "There is little appellate authority for the obvious reason that these orders are nearly always interlocutory; . . . the question seldom comes before a Circuit Court of Appeals."

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[33] *Finkelstein v. Boylan, 33 Fed. Supp. 657 (S. D. N. Y., 1940).*
[34] *Hickman v. Taylor, 153 F. 2d 212, 214 (1945) (329 U. S. 495).*

The matter of a definitive interpretation of the discovery rules as a guide to the federal Courts, by which the courts could uniformly apply the rules of discovery in keeping with the spirit and the law of the Federal Rules of Civil Procedure, falls well within the standards heretofore enunciated by this Court in determining whether a case merits review through a writ of certiorari.

This Court granted certiorari for the review of non-appealable interlocutory discovery orders in other cases[35] on other questions, on the stated ground that the discovery rules apply "to all civil litigation in the federal courts" and "thus concerns the enforcement of federal rights," and, that procedural devices may invade "substantive rights" that the common law has long sought to protect.

The same reasons compel the grant of certiorari to the petitioners herein.

E. Granting Discovery to Plaintiff of Irrelevant and Privileged Matters in Violation of the Rules (While Denying Any Discovery to Defendants), Is in Excess of Powers, Beyond the Court's Jurisdiction, and an Infringement of Constitutional Rights Against Unlawful Search and Seizures, and Conflicts With Other Circuits and With the Principles of Applicable Decisions of This Court.

The respondent Court ordered the production of defendants' records to plaintiff on irrelevant and privileged matter, extending beyond the scope of the action, including confidential records relating to other clients not parties to the action, and irrelevant to any of the issues.

The disclosure of confidential records to a business competitor, on matters wholly unrelated to the action, clearly transcends discretionary powers, is beyond the court's jurisdiction, and an infringement of constitutional rights against unlawful search and seizure.

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[35] *Hickman v. Taylor, 329 U. S. 495, 67 S. Ct. 385, 91 L. ed. 451 (1947).*

Sibbach v. Wilson & Co., 312 U. S. 1, 61 S. Ct. 422, 85 L. ed. 479 (1941).

It is obvious such an appeal after judgment "would come too late to afford the injured party any relief," warranting a writ. Petitioners are without any other remedy.

The denial of a writ to mandate the District Court to vacate such order, is in conflict with the decisions in other Circuits. The Eighth Circuit[36] held such compelled production "an unreasonable search and seizure."

Such conflict is typified by the case at bar. The adverse party respondent plaintiff itself made similar objection to such production in another case[37] as defendant in another circuit, and was sustained.

The respondent Judge even penalized not only the defendants but also their counsel, under *Rule 37,* for making objection to such admittedly unauthorized production.

Such determination conflicts with a controlling decision of this court,[38] that a district Court errs in holding the defendant in contempt for failure to produce that which he could not be compelled to produce under the discovery rule.

It is respectfully submitted that the instant case merits notice by this Court, to prevent such invasion of fundamental rights against unlawful search and seizure under the Constitution of the United States.

F. Discovery in Infringment Cases on Items of Account Before Establishing Right to Accounting. Conflict Within and Among the Circuits, and With a Prevailing Decision of the Supreme Court.

The respondent District Judge, in granting discovery to plaintiff, in this case for alleged infringement and

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[36]*Schwimmer v. United States, 232 F. 2d 855, 861 (C. A. 8, 1956).*

[37]*Stanzler v. Loew's, United Artists Corporation, et al., 19 F. R. D. 286 (D. Ct., Rh. I., 1955).*

[38]*Hickman v. Taylor, 329 U. S. 495, 67 S. Ct. 385, 91 L. ed. 451 (1947).*

See also: Sibbach v. Wilson & Co., 312 U. S. 1, 61 S. Ct. 422, 85 L. ed. 479 (1941).

accounting, on items of account, before establishing the right to an accounting, conflicted with the contrary ruling by a predecessor District Judge on the deposition of other defendants in *this same case.*

The denial of relief by the court below is in conflict with an applicable decision of this Court. As to suits of this nature, Mr. Justice Cardozo, speaking for a unanimous Supreme Court, said in *Sinclair Refining Co. v. Jenkins Petroleum Process Co.*:[39]

> "A suit . . . to restrain the infringement of a patent culminates, if successful, in an interlocutory decree, which will be followed by an accounting and a discovery of documents. In these and like cases, the *accounts will not be probed until the right has been adjudged.*" (Emphasis added.)

The principles of the *Sinclair* case have been applied by other courts to copyright infringement cases.[40]

The court below is in conflict also with decisions in other circuits.[41]

The *Sinclair* case antedates the Federal Rules. A review of the question by this Court, and a determination whether the principles of the *Sinclair* case are controlling under the new Rules of Civil Procedure, is important, for uniformity within and among the District and Circuit courts.

G. Violation of Miscellaneous Rules.

The additional orders, generally, made arbitrarily by the respondent Judge, show plainly the persistent disre-

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[39] *289 U. S. 689, 693, 53 S. Ct. 736, 77 L. ed. 1449 (1932).*

[40] *Orgel v. Clark Boardman Co., 20 F. R. D. 31 (S. D. N. Y., Oct., 1956).*

[41] *Jerome v. Twentieth Century-Fox Film Corp., 58 Fed. Supp. 13 (S. D. N. Y., 1944) (re copyright infringement);*
Anheuser-Busch Inc. v. Dubois Brewing Co., 3 F. R. D. 336 (D. C. W. D. Pa., 1943) (re infringement of registered trademark);
Sensytrol Corp. v. Radio Corp. of America, 18 F. R. D. 279 (S. D. N. Y., 1955).

gard of a number of additional rules, mandatory as well as discretionary. (See Summary of Orders, *Supp. Pet. pp. 4-10.*) To avoid undue prolongation, the details will not here be set forth, nor the conflict with other courts, on such additional subject matter.

Mandamus is the recognized remedy.

V.

The Writ Is Justified in the Absence of Any Other Remedy.

Appellate review will be defeated if a writ does not issue. The remedy by appeal after final judgment is inadequate.

If the question of appellate jurisdiction under Rule 54(b) is ever going to be resolved by the Supreme Court it must be brought before it at precisely the stage at which these proceedings now are. If the case comes up again after final adjudication by the trial court, then the entire jurisdictional point based upon questions of finality of intermediate orders will be moot.

A writ is the only method of reviewing also the court's denial to defendants of plaintiff's depositions and discovery proceedings. *Pre*-trial discovery cannot be corrected *post*-trial, where sought, as here, not only for pretrial preparation but also for evidentiary use of nonresidents' testimony, otherwise unavailable at trial.

The remedy by appeal after trial is inadequate also on the order striking not only the counterclaims and joinder of additional defendants but the defenses and denials. Proof of affirmative defenses stricken from the pleading cannot be asserted at the trial. Stricken denials, in effect, deprive defendants of *any* trial, in view of *Rule 8(d)* which provides that averments "are admitted when not denied in the responsive pleading." In view of the magnitude, complexity and extensive scope of this case, requiring a prolonged trial period, and the certainty of reversal of the erroneous orders on appeal after final judgment,

not only would postponed appellate review subject the litigants to unnecessary and oppressive burden of enormous expense and exceptional hardship but would result in considerable waste of the court's time.

Appeal after final judgment would also come too late to afford relief on the order granting to plaintiff, a business competitor, discovery of defendants' confidential business records on irrelevant and privilegel matter wholly unrelated to the action. Such compelled disclosure would result in irreparable injury, constituting unlawful invasion of constitutional rights against unreasonable search and seizure. Also, postponed appellate review on the issue of accounting similarly would become academic.

Postponement of review on the court's arbitrary orders generally, is also productive of injustice because of undue impairment of legal rights, in addition to the other related factors. Plainly, it is in the interests of justice to hold the District Court to the Rules of Civil Procedure. Public policy would best be served by a prompt determination of the fundamental issues presented.

It follows, as a necessary corollary, that the normal processes of appeal are here inadequate, and the issuance of an appropriate writ is both necessary and proper. The court below committed error in denying summarily the petition for mandamus and/or prohibition.

This Court can grant full relief.

Conclusion.

It is respectfully submitted that, upon authority and reason, in view of the importance of the federal questions raised here and the serious conflicts within and among the Courts of Appeals, this petition for writ of certiorari should be granted.

Respectfully submitted,

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